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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 MICHAEL MARQUES; CRISTINA
10 ROBLES,

11 Plaintiffs,

12 v.
13

14 FEDERAL HOME LOAN
15 MORTGAGE CORPORATION;
16 BANK OF AMERICA, NATIONAL
17 ASSOCIATION, successor by merger
18 to BAC Home Loan Servicing LP f/k/a
Countrywide Home Loans Servicing,
LP; DOES 1 THROUGH 10,
inclusive; APG FUND I, LLC,

19 Defendants.
20

CASE NO. 12cv1873 - IEG (MDD)

ORDER:

**(1) GRANTING MOTION TO
DISMISS BY BANK OF AMERICA,
NATIONAL ASSOCIATION, AND
FEDERAL HOME LOAN
MORTGAGE CORPORATION
[Doc. No. 15]; and**

**(2) DENYING AS MOOT MOTION
TO AMEND/CORRECT
COMPLAINT [Doc. No. 26]**

21 Presently before the Court is the motion of Defendants Bank of America,
22 National Association ("BANA") and Federal Home Loan Mortgage Corporation's
23 ("Freddie Mac") to dismiss Plaintiffs Michael Marques and Cristina Robles'
24 (collectively "Plaintiffs") second amended verified complaint ("SAC"). [Doc. No.
25 15, Def. Mot. to Dismiss ("Def. Mot.").] For the following reasons, the Court
26 **GRANTS** the motion. The Court also **DENIES AS MOOT** Plaintiffs' motion to
27 amend/correct the complaint. [Doc. No. 26, Pl.'s Mot. to Amend.]
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BACKGROUND

On July 30, 2012, Plaintiffs filed an initial complaint against Freddie Mac, BANA, and Does 1 through 10. [Doc. No. 1, Compl.] Plaintiffs filed their FAC on August 16, 2012 and added Defendant APG Fund I, LLC (“APG Fund”). [Doc. No. 3, FAC.] Freddie Mac filed a motion to dismiss the FAC, and the Court granted in part and denied in part the motion. [Doc. No. 5, Def.’s Mot.; Doc. No. 9.] Plaintiffs subsequently filed a SAC, alleging the following causes of action: (1) declaratory relief; (2) declaratory relief; (3) negligence; (4) quasi contract; (5) violation of California Business and Professions Code § 17200, *et seq.*; (6) accounting; and (7) quiet title. [Doc. No. 12, SAC.]

Plaintiffs allege the following facts in their SAC. On or about January 6, 2004, Plaintiffs obtained title to real property commonly known as 172 Whitney Street, Chula Vista, California (“the Property”) by grant deed. [Doc. No. 12, SAC ¶¶ 7, 29.] On or about September 6, 2006, Plaintiffs executed a mortgage note (“Note”) and a deed of trust in favor of First Magnus Financial Corporation (“First Magnus”) to borrow \$376,000 to finance the Property. [Id. ¶ 30; Doc. No. 15-1, Def.’s Mot. at 10.] The Deed of Trust named Mortgage Electronic Registration Systems (“MERS”) as the nominee for First Magnus and as the beneficiary of the Deed of Trust to secure the loan against the Property. [Doc. No. 12-2, Ex. B, Deed of Trust.]

Plaintiffs then allege that First Magnus attempted to securitize and/or sell their loan. Plaintiffs allege that neither the promissory note nor the deed of trust were validly transferred to an Unknown Trust “due to the failure to follow the basic legal requirements for the transfer of a negotiable instrument.” [Doc. No. 12, SAC ¶¶ 21-22.] Plaintiffs argue that consequently, “Defendants are merely third-party strangers to the loan transaction.” [Id. ¶ 31.]

Plaintiffs state that Freddie Mac “is either the trustee of a Mortgage Backed Security (“MBS”) established pursuant to the laws of the state of New York [or]

1 claims to own the relevant MBS that Defendants claim contains the Mortgage Note
2 that is the subject of this cause of action.” [Id. ¶ 9.] Plaintiffs state that they “are
3 ignorant as to the method . . . Defendant Freddie Mac claims to own an interest in
4 the subject Mortgage Note.” [Id.]

5 Defendants Freddie Mac and BANA argue in their motion to dismiss that an
6 assignment transferred the Deed of Trust from MERS to BANA on January 24,
7 2012. [Doc. No. 15-1, Def.’s Mot. at 10.] Defendants also argue in their motion to
8 dismiss that Quality Loan Service Corporation became the record trustee under the
9 Deed of Trust. [Id.]

10 Plaintiffs, however, allege that “no recorded assignment of the original Deed
11 of Trust was executed before the closing date of the trust.” [Doc. No. 12, SAC ¶
12 33.] They claim that the assignment of January 24, 2012 by MERS in favor of
13 BANA was both untimely and invalid because it was executed after the closing date
14 of the Unknown Trust, which violates the Pooling and Servicing Agreement
15 (“PSA”). [Id.] Plaintiffs also contend that the assignment was invalid because it
16 was fraudulently executed by Jeanine Abramoff, who Plaintiffs claim “lacked the
17 requisite corporate and legal authority to effect an actual ‘assignment’ of the
18 Mortgage Note and Deed of Trust. [Id. ¶ 47.]

19 Plaintiffs further allege that First Magnus declared bankruptcy on August 21,
20 2007. [Id. ¶ 34.] Because they contend that the assignment to BANA was
21 fraudulent, Plaintiffs argue that the Mortgage Note and Deed of Trust “became
22 subject to the jurisdiction of the Bankruptcy Trustee and the Bankruptcy Court.”
23 [Id.] Plaintiffs also argue that the Bankruptcy Trustee did not authorize the January
24 24, 2012 assignment of the Deed of Trust. [Id. ¶ 37.]

25 Plaintiffs allege that on April 11, 2012, BANA caused to be recorded and sent
26 to Plaintiffs a Notice of Default and Election to Sell Under Deed of Trust. [Id. ¶
27 99.] In July 2012, Plaintiffs allege that BANA, on behalf of Freddie Mac, caused
28 BANA’s agent Quality Loan Service Corporation to send to Plaintiffs an undated

1 and unsigned Notice of Trustee Sale to notify Plaintiffs that the Property would be
 2 sold on August 10, 2012. [Id.; Doc. No. 12-5, Ex. E, Notice of Trustee Sale.] On
 3 August 10, 2012, Quality Loan Service Corporation conducted a trustee's sale and
 4 sold the Property to Defendant APG Fund. [Doc. No. 12, SAC, ¶ 99.]

5 Plaintiffs allege that any actions by BANA to collect mortgage payments
 6 from Plaintiffs and then to undertake a non-judicial foreclosure and sell the Property
 7 are unlawful because the assignment of the deed of trust was invalid. [Id. ¶¶ 61,
 8 99.] Plaintiffs also allege that "Defendants failed to properly credit payments made,
 9 incorrectly calculated interest on the accounts, and failed to accurately debit fees, as
 10 these payments belonged to the true beneficiary of the Note and Deed of Trust."
 11 [Id. ¶ 105.]

12 DISCUSSION

13 **I. Motion to Dismiss**

14 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
 15 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
 16 Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). The court
 17 must accept all factual allegations pleaded in the complaint as true, and must
 18 construe them and draw all reasonable inferences from them in favor of the
 19 nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th
 20 Cir.1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain
 21 detailed factual allegations, rather, it must plead "enough facts to state a claim to
 22 relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
 23 (2007). A claim has "facial plausibility when the plaintiff pleads factual content
 24 that allows the court to draw the reasonable inference that the defendant is liable for
 25 the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing
 26 Twombly, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely
 27 consistent with' a defendant's liability, it stops short of the line between possibility
 28 and plausibility of entitlement to relief." Iqbal, 556 U.S. at 1949 (quoting

1 Twombly, 550 U.S. at 678).

2 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
3 relief’ requires more than labels and conclusions, and a formulaic recitation of the
4 elements of a cause of action will not do.” Twombly, 550 U.S. at 555 (quoting
5 Papasan v. Allain, 478 U.S. 265, 286 (1986)) (alteration in original). A court need
6 not accept “legal conclusions” as true. Iqbal, 556 U.S. at 678. Despite the deference
7 the court must pay to the plaintiff’s allegations, it is not proper for the court to
8 assume that “the [plaintiff] can prove facts that [he or she] has not alleged or that
9 defendants have violated the . . . laws in ways that have not been alleged.”

10 Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters,
11 459 U.S. 519, 526 (1983).

12 Further, a court generally may not consider materials beyond the pleadings
13 when ruling on a Rule 12(b)(6) motion. United States v. Ritchie, 342 F.3d 903,
14 907-08 (9th Cir. 2003). However, a court “may take judicial notice of matters of
15 public record . . . as long as the facts noticed are not subject to reasonable dispute.”
16 Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012).¹

17 As a general rule, a court freely grants leave to amend a complaint which has
18 been dismissed. Fed. R. Civ. P. 15(a). However, leave to amend may be denied
19 when “the court determines that the allegation of other facts consistent with the
20 challenged pleading could not possibly cure the deficiency.” Schreiber Distrib. Co.
21 v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

22
23 ¹ Defendants request that the Court take judicial notice of the following documents: (1) a deed
24 of trust; (2) an assignment of the deed of trust; (3) a substitution of trustee; (4) a notice of default; (5)
25 a notice of sale; and (6) a trustee’s deed upon sale. [Doc. No. 15-2, Request for Judicial Notice.]

26 Courts may take judicial notice of “a fact that is not subject to reasonable dispute because it:
27 (1) is generally known within the trial court’s jurisdiction; or (2) can be accurately and readily
28 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201.
Courts may take judicial notice of documents that are matters of public record or are quasi-public
documents. See Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001). In addition, if a
document forms the basis of a plaintiff’s complaint, “[t]he defendant may offer such a document, and
the district court may treat such a document as part of the complaint, and thus may assume that its
contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” United States v. Ritchie,
342 F.3d 903, 908 (9th Cir.2003). As the documents are of public record and are documents which
form the basis of Plaintiffs’ complaint, the Court **GRANTS** Defendants’ request for judicial notice.

A. First Cause of Action: Declaratory Relief

Plaintiffs in their SAC “allege that neither Freddie Mac, [BANA], The Unknown Trust, or [sic] the Doe Defendants, [sic] have a secured or unsecured legal, equitable, or pecuniary interest in the lien evidenced by the Deed of Trust and that its purported assignments have no value since the Deed of Trust is wholly unsecured.” [Doc. No. 12, SAC ¶ 122.] Plaintiffs request that the Court find that “Freddie Mac, [BANA], and the Doe Defendants have no rights or interest in the Note, Deed of Trust, or the Property, which authorizes them . . . to collect Plaintiffs’ mortgage payments or enforce the terms of the Note or Deed of Trust . . .” [Id. ¶ 125.] Defendants seek to dismiss Plaintiffs’ first cause of action for declaratory relief on the grounds that adequate remedies exist under other causes of action. [Doc. No. 15-1, Def.’s Mot. at 21-22.]

“Declaratory relief is appropriate: (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.” Guerra v. Sutton, 783 F.2d 1371, 1376 (9th Cir. 1986). “While the existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate, the availability of other adequate remedies may make declaratory relief inappropriate.” Fimbres v. Chapel Mortg. Corp., 2009 WL 4163332, at *5 (S.D. Cal. Nov. 20, 2009) (internal quotations and citations omitted). A federal court may decline to address a declaratory relief claim “[w]here the substantive suit would resolve the issues raised by the declaratory judgment action, . . . because the controversy has ‘ripened’ and the uncertainty and anticipation of litigation are alleviated.” Tina v. Countrywide Home Loans, Inc., 2008 WL 4790906, at *2 (S.D. Cal. Oct. 30, 2008) (quoting Tempco Elec. Heater Corp. v. Omega Eng’g, Inc., 819 F.2d 746, 749 (7th Cir. 1987)).

In the present case, the Complaint does not suggest that declaratory relief would entitle Plaintiffs to relief beyond what is requested in their substantive

1 claims. Furthermore, the Complaint does not suggest that the substantive suit would
 2 not resolve the issues raised by the claim for declaratory relief. For example,
 3 Plaintiffs' fourth cause of action for quasi contract requires the Court to determine
 4 whether Freddie Mac acquired an interest in the Note and whether BANA was
 5 entitled to collect payments from Plaintiffs. [Doc. No. 12, SAC ¶¶ 145-146.]
 6 Accordingly, declaratory relief is inappropriate, and the Court **GRANTS**
 7 Defendant's motion to dismiss as to Plaintiffs' first claim for declaratory relief, and
 8 **DISMISSES** it with prejudice.

9 **B. Third Cause of Action: Negligence**

10 The elements of a negligence claim are: (1) the defendant owed the plaintiff a
 11 duty of care; (2) the defendant breached that duty; (3) the breach was the proximate
 12 or legal cause of the resulting injury; and (4) the plaintiff was damaged. Ladd v.
 13 Cnty. of San Mateo, 12 Cal.4th 913, 917 (1996). Under California law, "as a
 14 general rule, a financial institution owes no duty of care to a borrower when the
 15 institution's involvement in the loan transaction does not exceed the scope of its
 16 conventional role as a mere lender of money." Nymark v. Heart Fed. Sav. & Loan
 17 Ass'n, 231 Cal.App.3d 1089, 1096 (1991). Special circumstances which give rise to
 18 a duty of care may exist when the "lender actively participates in the financed
 19 enterprise beyond the domain of the usual money lender." Lingad v. Indymac Fed.
 20 Bank, 682 F.Supp.2d 1142, 1149 (E.D. Cal. 2010) (quoting Nymark, 231
 21 Cal.App.3d at 1096). This rule also applies to loan servicers. Lingad, 682
 22 F.Supp.2d at 1149 (citing Azzini v. Countrywide Home Loans, 2009 WL 5218042,
 23 at *2 (S.D. Cal. Dec. 29, 2009)).

24 "In California, the test for determining whether a financial institution owes a
 25 duty of care to a borrower-client 'involves the balancing of various factors, among
 26 which are [1] the extent to which the transaction was intended to affect the plaintiff,
 27 [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff
 28 suffered injury, [4] the closeness of the connection between the defendant's conduct

1 and the injury suffered, [5] the moral blame attached to the defendant's conduct, and
 2 [6] the policy of preventing future harm." Nymark, 231 Cal.App.3d at 1098
 3 (quoting Connor v. Great Western Sav. & Loan Ass'n, 69 Cal.2d 850, 865 (1968)).

4 Plaintiffs in their SAC have made little effort to correct the deficiencies
 5 identified by the Court in their FAC. In their SAC, Plaintiffs again state that
 6 Defendants have a duty to "follow California law with regard to enforcement of
 7 monetary obligations, and to refrain from taking or failing to take action against
 8 Plaintiffs that they did not have the legal authority to do." [Doc. No. 12, SAC ¶
 9 140.] Plaintiffs also argue again in their opposition that Defendants Freddie Mac
 10 and BANA owed them a duty of care because of their "unconventional relationship"
 11 with Plaintiffs, without providing any further explanation of the "unconventional
 12 relationship." [Doc. No. 18, Pl.'s Opp. at 18.] Plaintiffs do not allege any facts
 13 showing that BANA and Freddie Mac exceeded the scope of their conventional
 14 roles. See Nymark, 231 Cal.App.3d at 1096. Therefore, Plaintiffs have not pled
 15 facts demonstrating that BANA and Freddie Mac owed them a duty of care.
 16 Accordingly, the Court **GRANTS** the motion to dismiss as to the third cause of
 17 action, and **DISMISSES WITH PREJUDICE** Plaintiffs' third cause of action.

18 **C. Fourth Cause of Action: Quasi-contract**

19 Plaintiffs seek to recover restitution on a quasi-contract cause of action for
 20 payments made to Freddie Mac and BANA. [Doc. No. 12, SAC ¶ 149.] Plaintiffs
 21 allege that "Freddie Mac has been unjustly enriched by collecting monthly payments
 22 from Plaintiffs when it had and has no interest in their Note or Deed of Trust." [Id.
 23 ¶ 148.] Plaintiffs allege that as the Assignment was "a false document fraudulently
 24 created and executed . . ." and that because it "created a fraudulent lien claim . . . ,
 25 Defendants have no right to collect payments." [Id. ¶¶ 46, 50.] As Plaintiffs' quasi
 26 contract claim is premised on fraudulent conduct by Defendants, Plaintiffs must
 27 meet the heightened pleading standards of Federal Rule of Civil Procedure 9(b).

28 Rule 9(b) applies to state-law causes of action. Vess v. Ciba-Geigy Corp.

1 USA, 317 F.3d 1097, 1103 (9th Cir. 2003). Even if fraud is not a necessary element
 2 of a claim, if a plaintiff chooses to allege in the complaint that the defendant has
 3 engaged in fraudulent conduct in support of a claim, “the allegations of fraud are
 4 subject to Rule 9(b)’s heightened pleading requirements.” Id. at 1104. When a
 5 plaintiff alleges a “unified course of fraudulent conduct and rel[ies] entirely on that
 6 course of conduct as the basis of a claim . . . the claim is said to be ‘grounded in
 7 fraud’ or to ‘sound in fraud,’ and the pleading of that claim as a whole must satisfy
 8 the particularity requirement of Rule 9(b).” Id. at 1103-04.

9 Rule 9(b) provides that “[i]n alleging fraud . . . , a party must state with
 10 particularity the circumstances constituting fraud” Fed. R. Civ. P. 9(b). A
 11 complaint meets this standard if it alleges “the time, place, and specific content of
 12 the false representations as well as the parties to the misrepresentations.” Swartz v.
 13 KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (citing Edwards v. Marin Park, Inc.,
 14 356 F.3d 1058, 1066 (9th Cir. 2004) (citation omitted)). “A pleading is sufficient
 15 under [R]ule 9(b) if it identifies the circumstances constituting fraud so that a
 16 defendant can prepare an adequate answer from the allegations.” Moore v. Kayport
 17 Package Exp., Inc., 885 F.2d 531, 540 (9th Cir. 1989). “[I]ntent, knowledge, and
 18 other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b).

19 Quasi contract is synonymous with unjust enrichment. See McLaughlin,
 20 2013 WL 1164432, at *7. “The theory of unjust enrichment requires one who
 21 acquires a benefit which may not justly be retained, to return either the thing or its
 22 equivalent to the aggrieved party so as not to be unjustly enriched.” Othworth v.
 23 So. Pac. Trans. Co., 166 Cal.App.3d 452, 460 (1985). “[A]n individual may be
 24 required to make restitution if he is unjustly enriched at the expense of another. A
 25 person is enriched if he receives a benefit at another’s expense. The term ‘benefit’
 26 denotes any form of advantage. . . . Even when a person has received a benefit from
 27 another, he is required to make restitution only if the circumstances of its receipt or
 28 retention are such that, as between the two persons, it is unjust for him to retain it.”

1 F.D.I.C. v. Dintino, 167 Cal.App.4th 333, 346-47 (2008) (internal citations and
2 quotations omitted).

3 Plaintiffs fail to meet the heightened pleading standards of Rule 9(b) for their
4 averments of fraud in support of the quasi contract claim. For example, Plaintiffs
5 summarily allege that “Freddie Mac, [BANA], and others acting in concert with
6 them, knowingly accepted payments and retained them for its [sic] own use
7 knowing Freddie Mac had not acquired and never did acquire an interest in
8 Plaintiffs’ Note.” [Doc. No. 12, SAC ¶ 146.] Plaintiffs fail to plead with
9 particularity the circumstances constituting the alleged fraud. See Fed. R. Civ. P.
10 9(b). Plaintiffs provide no information regarding the time, place, and specific
11 content of Freddie Mac and BANA’s demands for payment and acceptance of
12 payment. See Swartz, 476 F.3d at 764. Therefore, even taking Plaintiffs’
13 allegations as true, see Cahill, 80 F.3d at 337-38, the Court **GRANTS** Defendants’
14 motion to dismiss as to Plaintiffs’ fourth cause of action for failure to meet Rule
15 9(b)’s heightened pleading requirements for fraud, and **DISMISSES** it without
16 prejudice.

17 **D. Fifth Cause of Action: Violation of California Business and**
18 **Professions Code § 17200, et. seq.**

19 California Business and Professions Code § 17200 *et. seq.*, also referred to as
20 the unfair competition law (“UCL”), “prohibits, and provides civil remedies for,
21 unfair competition, which it defines as ‘any unlawful, unfair or fraudulent business
22 act or practice.’” Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 320 (2011)
23 (quoting Cal. Bus. & Prof. Code § 17200).

24 “Because the statute is written in the disjunctive, it prohibits three separate
25 types of unfair competition: (1) *unlawful* acts or practices, (2) *unfair* acts or
26 practices, and (3) *fraudulent* acts or practices.” Quintero Family Trust v. OneWest
27 Bank, F.S.B., 2010 WL 2618729 (S.D. Cal. June 25, 2010) (citing Cel-Tech
28 Commc’ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 180 (1999)). “Each prong

1 of the UCL is a separate and distinct theory of liability.” Kearns v. Ford Motor Co.,
 2 567 F.3d 1120, 1127 (9th Cir. 2009) (citing South Bay Chevrolet v. Gen. Motors
 3 Acceptance Corp., 72 Cal.App.4th 861 (1999)). However, Plaintiffs do not
 4 distinguish among the three separate types of unfair competition, and instead allege
 5 that “Defendants Freddie Mac, [BANA], and one or more D[oe] Defendants [sic]
 6 acts and practices are unlawful, unfair, and fraudulent.” [Doc. No. 12, SAC ¶¶ 155,
 7 156.]

8 Private standing under the UCL is limited to “a person who has suffered
 9 injury in fact and has lost money or property as a result of the unfair competition.”
 10 Cal. Bus. & Prof. Code § 17204. The intent of this section is to “confine standing to
 11 those actually injured by a defendant’s business practices.” Kwikset Corp., 51
 12 Cal.4th at 321. Even assuming Plaintiffs have private standing under the UCL, they
 13 fail to state a claim under the UCL.

14 **1. Unlawful Practices**

15 “The unlawful practices prohibited by . . . section 17200 are any practices
 16 forbidden by law, be it civil or criminal, federal, state, or municipal, statutory,
 17 regulatory, or court-made.” South Bay Chevrolet v. Gen. Motors Acceptance Corp.,
 18 72 Cal.App.4th 861, 880 (1999). “Where a plaintiff cannot state a claim under the
 19 ‘borrowed’ law, she cannot state a UCL claim either.” Rubio v. Capital One Bank
 20 (USA), N.A., 572 F.Supp.2d 1157, 1168 (C.D. Cal. 2008) (citing Smith v. State
 21 Farm Mutual Auto. Ins. Co., 93 Cal.App.4th 700, 718 (2001)).

22 Plaintiffs summarily allege that Defendants’ actions are in violation of 12
 23 U.S.C. § 2605(c), *et seq.*, California Penal Code § 532(f)(a)(4), and 18 U.S.C. §
 24 1951(b)(2). [Doc. No. 12, SAC ¶¶ 151-153.] 12 U.S.C. § 2605(c) states that
 25 “[e]ach transferee servicer to whom the servicing of any federally related mortgage
 26 loan is assigned, sold, or transferred shall notify the borrower of any such
 27 assignment, sale, or transfer.” 12 U.S.C. § 2605(c). California Penal Code §
 28 532(f)(a)(4) pertains to false pretenses. 18 U.S.C. § 1951(b)(2) criminalizes

1 interference with commerce by threats or violence.

2 Merely listing these statutes, without articulating specific facts to satisfy each
3 element, is insufficient to state a violation of the UCL under the unlawful business
4 practices prong. See Bejou v. Bank of America, N.A., 2013 WL 1759126, at *5
5 (E.D. Cal. Apr. 24, 2013); Saldate v. Wilshire Credit Corp., 686 F.Supp.2d 1051,
6 1067 (E.D. Cal. 2010) (“The complaint’s bare reference to federal statutes and
7 common law claims provides not the slightest inference that [the plaintiff] has a
8 viable UCL claim.”). Accordingly, Plaintiffs fail to state a claim under the UCL for
9 unlawful business practices.

10 **2. Unfair Practices**

11 California case law is somewhat unsettled regarding what constitutes an
12 unfair business practice in consumer cases. See Davis v. Ford Motor Credit Co.,
13 179 Cal.App.4th 581, 594, 597-98 (2009); see also Lozano v. AT&T Wireless
14 Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007). The Ninth Circuit in Lozano
15 counseled that in the consumer context, California courts use two tests: (1) the
16 unfairness must be tied to a “legislatively declared” policy; and (2) a balancing test.
17 Id. (citing Cel-Tech Comm’ns, Inc. v. L.A. Cellular Telephone Co., 20 Cal.4th 163
18 (1999); South Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal.App.4th 861
19 (1999)); see also Fife v. Facebook, Inc., 2012 WL 5303297, at *16 (N.D. Cal. Oct.
20 25, 2012). Under the Cel-Tech test, the unfairness must “be tethered to some
21 legislatively declared policy or proof of some actual or threatened impact on
22 competition.” Cel-Tech, 20 Cal.4th 186-87. Under the South Bay
23 Chevrolet balancing test, determining whether a business practice is unfair
24 “involves an examination of [that practice’s] impact on the alleged victim, balanced
25 against the reasons, justifications and motives of the alleged wrongdoer. In brief,
26 the court must weigh the utility of the defendant’s conduct against the gravity of the
27 harm to the alleged victim.” South Bay Chevrolet, 72 Cal.App.4th at 886 (internal
28 quotations omitted). Plaintiffs conclude, without providing any supporting facts,

1 that the “acts and practices [of Defendants] are unfair and the harm cause [sic] by
2 the conduct outweighs any benefits that they conduct may have.” [Doc. No. 12,
3 SAC ¶ 158.]

4 Plaintiffs fail to allege facts to state a claim under either test as they only
5 provide “a formulaic recitation of the elements of [the] cause of action.” Twombly,
6 550 U.S. at 555. Although Plaintiffs do allege an injury, Plaintiffs fail to allege
7 facts to support their legal conclusion that the injury was not outweighed by any
8 countervailing benefits. See Rabago v. Deutsche Bank Nat. Trust Co., 2011 WL
9 2173811, at *5 (C.D. Cal. June 1, 2011). Plaintiffs also do not allege that the
10 unfairness is tethered to a legislatively declared policy or provide proof of impact
11 on competition. As Plaintiffs have failed to allege facts to support the required
12 elements, they fail to state a claim for unfair business practices under the UCL.

13 3. Fraudulent Practices

14 Conduct is “fraudulent” under the UCL if it is “likely to deceive.” Morgan v.
15 AT&T Wireless Servs., Inc., 177 Cal.App.4th 1235, 1254 (2009). A plaintiff must
16 “show that members of the public are likely to be deceived.” Williams v. Gerber
17 Prods. Co., 552 F.3d 934 (9th Cir. 2008) (quoting Bank of West v. Superior Court, 2
18 Cal.4th 1254, 1267 (1992)). A plaintiff must also allege the existence of a duty to
19 disclose and reliance. In re Tobacco II Cases, 46 Cal.4th 298, 328 (2009);
20 Berryman v. Merit Prop. Mgmt., Inc., 152 Cal.App.4th 1544, 1557 (2007).

21 A plaintiff must also meet the requirements of Rule 9(b), which requires a
22 plaintiff to allege “the who, what, when, where, and how” of the alleged fraudulent
23 conduct. Kearns, 567 F.3d at 1125; Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.
24 1997). Here, Plaintiffs summarily state that the “acts and practices [of Defendants]
25 are likely to deceive members of the public.” [Doc. No. 12, SAC ¶ 157.] As
26 discussed above, Plaintiffs fail to plead with particularity the circumstances
27 constituting the alleged fraud as required by Rule 9(b). Accordingly, Plaintiffs fail
28 to state a claim for fraudulent business practices under the UCL.

1 As Plaintiffs fail to state a claim under all three prongs of the UCL, the Court
 2 **GRANTS** Defendants' motion to dismiss as to Plaintiffs' fifth cause of action and
 3 **DISMISSES** without prejudice Plaintiffs' fifth cause of action.

4 **E. Sixth Cause of Action: Accounting**

5 "A cause of action for an accounting requires a showing that a relationship
 6 exists between the plaintiff and defendant that requires an accounting, and that some
 7 balance is due the plaintiff that can only be ascertained by an accounting."
 8 Tamburri v. Suntrust Mortg., Inc., 2011 WL 6294472, at *17 (N.D. Cal. Dec. 15,
 9 2011) (quoting Teselle v. McLoughlin, 173 Cal.App.4th 156, 179 (2009)).

10 Plaintiffs allege that Freddie Mac and BANA have "held themselves out to be
 11 Plaintiffs' creditor and mortgage servicer," and that "[a]s a result of this purported
 12 relationship with Plaintiffs, said Defendants have a fiduciary duty to Plaintiff [sic]
 13 to properly account for payments made by Plaintiffs." [Doc. No. 12, SAC ¶ 166.]
 14 Plaintiffs also allege that "[a]s a result of . . . fraudulent conduct, Plaintiff [sic] paid
 15 Freddie Mac, [BANA], and other agents and employees of Freddie Mac[] mortgage
 16 payments for a period of many years." [Id. ¶ 167.] Plaintiffs argue that since the
 17 money paid Freddie Mac was not owed to it, these amounts "are due to be returned
 18 to the Plaintiffs in full." [Id.] Defendants argue that Plaintiffs are subject to the
 19 heightened pleading requirements of Rule 9(b) and "fail to state any facts
 20 supporting their claim that Freddie Mac held itself out to be the holder of the
 21 [N]ote." [Doc. No. 15-1, Def.'s Mot. at 28-29.]

22 As discussed above, Plaintiffs fail to meet the heightened pleading
 23 requirements for Rule 9(b) for the fraudulent conduct that forms the basis of the
 24 accounting claim as they do not plead the time, place, and specific content of
 25 Defendants' demands for payment and acceptance of payment. See Swartz, 476
 26 F.3d at 764. Therefore, even taking Plaintiffs' allegations as true, see Cahill, 80
 27 F.3d at 337-38, the Court **GRANTS** Defendants' motion to dismiss as to Plaintiffs'
 28 sixth cause of action for failure to meet Rule 9(b)'s heightened pleading

requirements for fraud, and **DISMISSES** it without prejudice.

F. Seventh Cause of Action: Quiet Title

California Code of Civil Procedure § 761.020 “mandates a verified complaint for a quiet title action to include:” (1) “A legal description and street address of the subject real property;” (2) “The title of plaintiff as to which determination is sought and the basis of the title;” (3) “The adverse claims to the title of the plaintiff against which a determination is sought;” (4) “The date as of which the determination is sought;” and (5) “A prayer for the determination of the title of the plaintiff against the adverse claims.” Hamilton v. Bank of Blue Valley, 746 F.Supp.2d 1160, 1177 (E.D. Cal. 2010) (citing Cal. Code Civ. P. § 761.020) (internal quotation marks omitted).

Defendants argue that “there is no [q]uiet [t]itle cause of action against Defendants [Freddie Mac and BANA] because the property [was] sold to a third party purchaser.” [Doc. No. 15-1, Def.’s Mot. at 30.] Plaintiffs in their opposition state that they “have no objection to dismissal of the eighth cause of action as against Defendant Freddie Mac and Defendant [BANA] as requested by all parties.” [Doc. No. 18, Pl.’s Opp. at 22.] Accordingly, the Court **GRANTS** Defendants’ motion to dismiss as to the seventh cause of action for quiet title, and **DISMISSES WITH PREJUDICE** this claim as to Defendants Freddie Mac and BANA.

CONCLUSION

For the reasons above, the Court **GRANTS** Defendants’ motion to dismiss. Specifically, the Court:


1. **DISMISSES** with prejudice Plaintiffs’ first cause of action;
2. **DISMISSES** with prejudice Plaintiffs’ third cause of action;
3. **DISMISSES** without prejudice Plaintiffs’ fourth cause of action;
4. **DISMISSES** without prejudice Plaintiffs’ fifth cause of action;
5. **DISMISSES** without prejudice Plaintiffs’ sixth cause of action;
7. **DISMISSES** with prejudice Plaintiffs’ seventh cause of action as to

Defendants Freddie Mac and BANA.

Plaintiffs are **GRANTED** twenty-one (21) days from the date this Order is filed to file a Third Amended Complaint addressing the deficiencies set forth above of the fourth, fifth, and sixth causes of action. The Court **DENIES AS MOOT** Plaintiffs' motion to amend/correct the complaint. [Doc. No. 26, Pl.'s Mot. to Amend.]

IT IS SO ORDERED.

DATED: May 8, 2013


IRMA E. GONZALEZ
United States District Judge